

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. DR-00-88
)	
CIVIL SERVICE COMMISSION, COUNTY)	DECISION NO. 445
OF HAWAII,)	
)	FINDINGS OF FACT, CONCLUSIONS
Petitioner,)	OF LAW, AND ORDER
)	
and)	
)	
HAWAII CIVIL RIGHTS COMMISSION,)	
State of Hawaii,)	
)	
Intervenor.)	
)	

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND DECLARATORY ORDER

On January 23, 2003, the CIVIL SERVICE COMMISSION, County of Hawaii/Merit Appeals Board (Petitioner or Commission) filed a Petition for Declaratory Ruling with the Hawaii Labor Relations Board (Board). Petitioner seeks a ruling pursuant to Hawaii Administrative Rules (HAR) § 12-42-9 and Hawaii Revised Statutes (HRS) § 76-14(c)(2), as to whether under HRS § 76-14(c)(1), Petitioner has the authority to act on or must defer jurisdiction over an appeal filed by Mr. Wade Amador (Amador) alleging his non-selection for a permanent civil service position was discriminatory because of race, “who they know and qualifications” to the Hawaii Civil Rights Commission (HCRC or Intervenor).

By Order No. 2176, issued February 28, 2003, the Board granted the HCRC’s petition for intervention based on a showing of sufficient interest in the issue raised by the Petitioner.

On March 10, 2003, the Board held a status conference to clarify the issues presented and set a briefing schedule.

On April 7, 2003, the Petitioner and Intervenor filed their respective position statements and memoranda of points and authorities regarding Petitioner’s jurisdiction over Amador’s appeal.

Based upon a review of the entire record, the Board makes the following findings of fact, conclusions of law, and declaratory order.

FINDINGS OF FACT

1. Petitioner Commission functions as the County's Merit Appeals Board, pursuant to HRS § 76-47(b),¹ which has "exclusive authority to hear and decide appeals relating to matters set forth in section 76-14 concerning the civil service of the jurisdiction." HRS § 76-47(a).
2. Intervenor HCRC is an "administrative agency" within the meaning of HRS § 76-14(c)(1).²
3. On September 4, 2002, Wade P. Amador filed an appeal with the Petitioner alleging that his non-selection for a permanent civil service position by the Department of Public Works, County of Hawaii (County or appointing

¹HRS § 76-47(b), provides in part:

A jurisdiction may continue to use its civil service commission or appeals board, with or without modification, as its merit appeals board to assume all of the functions and responsibilities under section 76-14;

²HRS § 76-14(c) provides in part:

The rules adopted by the merit appeals board shall provide for the following:

- (1) The merit appeals board shall not act on an appeal, but shall defer to other authority, if the action complained of constitutes a prohibited act that is subject to the jurisdiction of another appellate body or administrative agency or the grievance procedure under a collective bargaining agreement;

authority) was discriminatory because of race, “who they know” and qualifications.

4. On January 21, 2003, at the hearing before the Petitioner, Amador testified that he had filed a complaint with the HCRC alleging, inter alia, his non-selection was the result of race discrimination. The County employer acknowledged Amador’s employment discrimination complaint, but argued that Petitioner had jurisdiction to hear the appeal, notwithstanding Rule 104-3(a)³ adopted pursuant to HRS § 76-14. Amador took the position that he knew Petitioner would not help him, and should deny his appeal and let the HCRC handle it.
5. At the hearing on January 21, 2003, Petitioner notified Amador and the County that it would hold the appeal in abeyance while it sought a ruling from the Board pursuant to HRS § 76-14, which states in part:

(c) The rules adopted by the merit appeals board shall provide for the following:

* * *

- (2) The merit appeals board shall not proceed on an appeal or shall hold proceedings in abeyance if there is any controversy regarding its authority to hear the appeal until the controversy is resolved by the Hawaii labor relations board;

6. Amador’s appeal with Petitioner of his non-selection for the permanent civil service position alleging that it was discriminatory because of race, “who they know” and qualifications, constitutes a prohibited act subject to the jurisdiction of the HCRC.

DISCUSSION

For the first time since the enactment of the “Civil Service Reform Act,” Act 253, 2000 SLH, establishing, inter alia, merit appeals boards for each county jurisdiction upon the demise of the civil service commissions, the Board is being asked to resolve a

³Petitioner’s Rule 104-3(a) states:

The Commission shall not act on an appeal but shall defer to other authority if the action complained of constitutes a prohibited act that is subject to the jurisdiction of another appellate body or administrative agency or the grievance procedure under a collective bargaining agreement.

controversy regarding Petitioner's authority to hear an appeal, as provided under HRS § 76-14(c)(2).

The issue presented is whether Petitioner has authority to act on Amador's appeal over his non-selection for a permanent civil service position which includes a claim of race-based employment discrimination, when an employment discrimination complaint over Amador's non-selection is pending before the HCRC.

The established rules guiding the Board's interpretation of HRS § 76-14, is articulated in Housing Finance and Development Corp. v. Castle, 79 Hawai'i 64, 76-77, 898 P.2d 576 (1995) as follows:

“[t]he fundamental starting point . . . is the language of the statute itself.” *AIG Hawai'i Ins. Co. v. Estate of Caraang*, 74 Haw. 620, 633, 851 P.2d 321, 328 (1993) (citation and internal quotation marks omitted) “Moreover, where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning.” *Id.* (citation and internal quotation marks omitted). “When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself.” *Crosby v. State Dep't of Budget & Finance*, 76 Hawai'i 332, 340, 876 P.2d 1300, 1308 (1994), *cert. denied sub nom., Crosby v. Hawai'i*, ___ U.S. ___, 115 S.Ct. 731, 130 L.Ed.2d 635 (1995) (citation and internal quotation marks omitted). And “[w]e must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.” *Franks v. City and County of Honolulu*, 74 Haw. 328, 335, 843 P.2d 668, 671 (1993) (citation omitted).

““When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute[,] an ambiguity exists.”” *Mehau v. Reed*, 76 Hawai'i 101, 109, 869 P.2d 1320, 1328 (1994) (quoting *Franks*, 74 Haw. at 335, 843 P.2d at 671). Put differently, a statute is ambiguous if it is “capable of being understood by reasonably well-informed people in two or more different senses.” 2A N. Singer, *Sutherland Statutory Construction* § 45.02 at 6 (5th ed. 1992). . . .

In construing an ambiguous statute, “[t]he meaning of the ambiguous words may be sought by examining the context, with

which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.” HRS § 1-15(1) (1985). Moreover, “[t]he courts may resort to extrinsic aids in determining legislative intent.” *State v. Mundell*, 8 Haw.App. 610, 616, 822 P.2d 23, 27 (citing *Crawford v. Financial Plaza Contractors*, 64 Haw. 415, 643 P.2d 48 (1982)), *cert. denied*, 72 Haw. 619, 841 P.2d 1075 (1991). One avenue is the use of legislative history as an interpretive tool. *Pacific Int’l Services Corp. v. Hurip*, 76 Hawai’i 209, 217, 873 P.2d 88, 96 (1994); *Franks*, 74 Haw. at 335, 843 P.2d at 671-72.

The Board may also consider “[t]he reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning.” HRS § 1-15(2) (1993); *State v. Pacheco*, 96 Hawai’i 83, 94-95, 26 P.3d 572 (2001).

We begin by examining the language of the statute. Pursuant to HRS § 76-47, the merit appeals board has “exclusive authority to hear and decide appeals relating to matters set forth in section 76-14 concerning the civil service” for the County of Hawaii. HRS § 76-47(a) (Emphasis added). However, the exclusive jurisdiction of the merit appeals board is limited by HRS § 76-14(c)(1) which provides:

The merit appeals board shall not act on an appeal, but shall defer to other authority, if the action complained of constitutes a prohibited act that is subject to the jurisdiction of another appellate body or administrative agency or the grievance procedure under a collective bargaining agreement;

HRS § 76-14(c)(1) provides Petitioner “shall not act on an appeal, but shall defer to other authority, if the action complained of constitutes a prohibited act that is subject to the jurisdiction of another appellate body or administrative agency[.]” (Emphasis added). The term “shall” in its ordinary sense, is mandatory, and not permissive. See, *Southern Food Group, L.P. v. State, Depart. of Educ.*, 89 Hawai’i 443, 455, 974 P.2d 1033, (1999), (where the Hawaii Supreme Court held that the language “shall,” as used in an administrative rule requiring the rejection of non-responsive bids, is mandatory.) Thus, under the plain language of the statute, if the action complained of is a prohibited act subject to the jurisdiction of another administrative agency, the merit appeals board shall not act on an appeal but shall defer to the other authority.

Like this Board, the Petitioner and HCRC are creatures of statute. The legislative mandates set forth in HRS § 76-14(c)(1) are plain and unambiguous. The statute contains two mandates B first, Petitioner has no authority to take action or exercise power on an appeal, and second, Petitioner must defer an appeal “to other authority” and loses its

authority to act on the appeal. The plain language of the statute makes clear that the legislature intended to strip Petitioner of its exclusive authority to “act on an appeal . . . if the action complained of constitutes a prohibited act that is subject to the jurisdiction of another appellate body or administrative agency[.]”

Under the facts before the Board, Amador filed a complaint with Petitioner alleging his non-selection for a permanent civil service position was due to race discrimination, “Who they know,” and qualifications. Amador also filed a race discrimination complaint over his non-selection with the HCRC. As race discrimination is prohibited by the laws administered by the HCRC,⁴ we find Amador’s complaint is subject to the jurisdiction of the HCRC and clearly, under HRS § 76-14(c)(1) the merit appeals board must defer to the HCRC.

Intervenor HCRC contends that Amador’s appeal should be bifurcated so that the merit appeals board retains jurisdiction over the purely civil service issues of “who they know” and qualifications and defers the race discrimination claim to the HCRC. The HCRC contends that it cannot decide the civil service claims and such claims would be lost if the entire case were deferred to the HCRC. The HCRC’s interpretation is premised on the assumption that the merit appeals board retains jurisdiction when an appeal is deferred pursuant to HRS § 76-14(c)(1). However, a plain reading of the legislative mandate that Petitioner “shall not act on an appeal,” leaves no doubt as to the meaning and intent when the “action complained of . . . is subject to the jurisdiction of another . . . administrative agency[.]” Petitioner has no authority to act on Amador’s appeal other than to defer to the HCRC. An interpretation favoring bifurcation, would render the phrase “shall not act on an appeal” meaningless. Hence, the legislative mandate does not support an interpretation favoring bifurcation of claims.

Assuming arguendo, there is an ambiguity in the statute over the meaning of the “shall defer” language of the statute, we look to the legislative history of the Civil Service law in HRS § 76-1(1) prior to July 1, 2002, where the equal employment opportunity policy was embodied in a personnel system based on merit principles consistent with a policy of

⁴HRS § 378-2 defines unlawful discriminatory practices providing, in part, as follows:

It shall be an unlawful discriminatory practice:

- (1) Because of race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record:
 - (A) For any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment; . . .

equal opportunity “for all regardless of race, sex, age, religion, color, ancestry, or politics.” Presently, HRS § 76-1(1) more generally seeks to achieve a civil service system based on the merit principle administered in such a manner that is consistent with and operates under an equal opportunity policy “for all in compliance with all laws prohibiting discrimination.”

In comparing the general duties and jurisdiction of the former civil service commissions⁵ and the merit appeals boards,⁶ we find the latter’s scope, function and jurisdiction to be more narrowly defined than the predecessor civil service commission. And while race-based employment discrimination claims were previously contemplated under the jurisdiction of the civil service commission, the repeal of HRS § 76-44⁷ effective July 1, 2002 demonstrates the legislature’s intent to remove potential claims, inter alia, of racial discrimination from HRS Chapter 76.

⁵HRS § 76-14, General duties of commission [Effective until July 1, 2002], stated:

The civil service commission shall hear and decide appeals from any action of the director of human resources development under this chapter, as well as from dismissals, demotions, and suspensions as hereinafter provided.

⁶HRS § 76-14, Merit appeals board; duties, and jurisdiction [Effective July 1, 2002], states:

(a) The merit appeals board of each jurisdiction shall decide appeals from any action under this chapter taken by the chief executive, the director, an appointing authority, or a designee acting on behalf of one of these individuals, relating to:

- (1) Recruitment and examination;
- (2) Classification and reclassification of a particular position;
- (3) Initial pricing of classes; and
- (4) Other employment actions under this chapter, including disciplinary actions and adverse actions for failure to meet performance requirements taken against civil service employees who are excluded from collective bargaining coverage under section 89-6.

(b) Any person suffering legal wrong by an action under subsection (a)(1) or aggrieved by such action shall be entitled to appeal to the merit appeals board. Any employee covered by chapter 76 suffering legal wrong by an action under subsection (a)(2) or (3) shall be entitled to appeal to the merit appeals board. Only employees covered by chapter 76, who are excluded from collective bargaining, suffering legal wrong by an action under subsection (a)(4) shall be entitled to appeal to the merit appeals board. Appeals under this section shall be filed within time limits and in the manner provided by rules of the merit appeals board.

⁷HRS § 76-44, stated:

No person holding any position in the civil service shall be suspended, demoted, or dismissed from the person’s position on racial, sex, age, religious, color, ancestry, marital status, or political grounds. [Repealed effective July 1, 2002.]

Furthermore, the Board cannot find that bifurcation is consistent with the legislative purpose for limiting the exclusive jurisdiction of the merit appeals board. Although the legislative history of Act 253 does not specifically discuss the overlapping jurisdiction between the civil service commission/merit appeals board and the HCRC, both the House and Senate committees reviewing the bill indicated the intent to eliminate conflicting remedies and create a bright line between the contract grievance process and the merit appeals board.

It was brought to the attention of your Committees that there are conflicting remedies existing between statutory provisions and collective bargaining agreements. To remedy this situation, disputes over wages, hours, and conditions of employment should be resolved before the Hawaii Labor Relations Board. To avoid duplication of efforts, section 76-48, HRS, has been amended to clarify that the Civil Service Commission does not have jurisdiction over disputes involving wages, hours, and conditions of employment.

S.C.Rep. No. 1344-00, 2000 House Journal at 1524.

Your Committees have heard that one of the keys to successful modernization and a more responsive, adaptive government, is to restore the “bright line” - the clear delineation between civil service and collective bargaining. After considerable discussion, your Committees have made this “bright line” concept the basis for deliberations on the many concepts contained in this measure.

* * *

[The bill] Coordinates and simplifies the complaint and grievance process as a result of the delineation between civil service and collective bargaining - the “bright line” division;

S.C.Rep. No. 2686, 2000 Senate Journal at 1104, 1006.

The same rationale supporting the restoration of a “bright line” to clearly delineate civil service from collective bargaining complaints applies equally to the merit appeals board and the HCRC complaints since the HCRC is an “administrative agency” within the meaning of HRS § 76-14(c)(1). The legislative history of Act 253 makes clear that where an issue may be subject to the jurisdiction of a body other than the civil service commission/merit appeals board, the Petitioner has no authority to act on an appeal in whole,

or in part. This is the bright line test intended by the legislature when it established the merit appeals board.

And, although applying a bright line test may limit the forums for litigating legal claims against the public employer, such a result is consistent with the reason and spirit of the Civil Service Reform Act. The legislature recognized that conflicting legal remedies were inherent in the statutory provisions. Consequently, the legislature meant to limit the jurisdiction of the merit appeals board, eliminate conflicting remedies as well as avoid duplication of efforts between the civil service commission/merit appeals boards and other administrative agencies such as this Board and the HCRC. In addition, we agree with the Petitioner that under the facts before the Board, the HCRC will review and receive evidence involving the civil service issues, i.e., whether the recruitment and examination process was fairly conducted, whether Amador was the best qualified person for the position, and whether there was discrimination, pretext or legitimate, non-discriminatory reasons for the non-selection. Thus, in this case the HCRC should be able to address the civil service issues as the issues are necessary for a determination of whether discrimination occurred, i.e., “who they know” and qualifications.

Accordingly, we conclude that Petitioner must defer Amador’s appeal including claims that his non-selection for a permanent civil service position allegedly because of race, “who they know” and qualifications to the HCRC because the action complained of is subject to its jurisdiction.⁸

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this petition pursuant to HRS §§ 89-5(b)(5), 76-14(c)(2), 91-8, and HAR § 12-42-9.
2. Petitioner has “exclusive authority to hear and decide appeals relating to matters set forth in section 76-14 concerning the civil service” for the County of Hawaii. HRS § 76-47(a).
3. The exclusive jurisdiction of the merit appeals board is limited by HRS § 76-14(c)(1). The legislative mandates set forth in HRS § 76-14(c)(1) are plain and unambiguous. There are two mandates - first, that Petitioner has no authority to take action or exercise power on an appeal, and second, upon

⁸The Board’s holding is limited to the facts presented in this case in accordance with HAR § 12-42-9(i) which provides:

An order disposing of a petition shall be applicable only to the factual situation alleged in the petition or set forth in the order. The order shall not be applicable to different factual situations or where additional facts not considered in the order exist. Such order shall have the same force and effect as other orders issued by the board.

losing its authority to act, Petitioner must defer an appeal “to other authority.” The plain language of the statute makes clear that the legislature intended to strip Petitioner of its exclusive authority to “act on an appeal . . . if the action complained of constitutes a prohibited act that is subject to the jurisdiction of another appellate body or administrative agency[.]”

4. The legislative mandate does not support an interpretation favoring bifurcation of claims, since it is clear that Petitioner has no authority to act and has no choice but to defer the action complained of. In this case, the action complained of is Amador’s non-selection. Such a result is consistent with the legislative intent to limit the jurisdiction of the merit appeals board, eliminate conflicting remedies as well as avoid duplication of efforts between the civil service commission/merit appeals boards and other administrative agencies.

DECLARATORY ORDER

Petitioner has no authority to act on Amador’s appeal over his non-selection for a permanent civil service position because the action complained of is subject to the jurisdiction of the HCRC. Therefore, Petitioner must defer the appeal in its entirety to the HCRC.

DATED: Honolulu, Hawaii, August 19, 2003.

HAWAII LABOR RELATIONS BOARD

/s/BRIAN K. NAKAMURA
BRIAN K. NAKAMURA, Chair

/s/CHESTER C. KUNITAKE
CHESTER C. KUNITAKE, Member

/s/KATHLEEN RACUYA-MARKRICH
KATHLEEN RACUYA-MARKRICH, Member

CIVIL SERVICE COMMISSION, County of Hawaii and HAWAII CIVIL RIGHTS COMMISSION,
State of Hawaii
CASE NO. DR-00-88
DECISION NO. 445
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Copies sent to:

Sarah R. Hirakami, Deputy Attorney General
John Ishihara, Esq.
Joyce Najita, IRC
William Puette, CLEAR
State Archives
Publications Distribution Center
University of Hawaii Library
Richardson School of Law Library
Library of Congress